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No. 02-9410

In The Supreme Court of the United States

MICHAEL D. CRAWFORD,

Petitioner,

vs.

STATE OF WASHINGTON,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Washington

BRIEF FOR RESPONDENT

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether this Court should abandon over a century of this Court's jurisprudence holding that the Confrontation Clause is not intended to exclude all hearsay, in favor of a framework designed to eliminate relevant and reliable evidence that is unfavorable to the defense.

2. Whether this Court should confirm this court's long established rule that the "interlocking confession" of an unavailable co-defendant is sufficiently reliable to satisfy the Confrontation Clause.

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SUMMARY OF ARGUMENT

The admission of a co-defendant's interlocking confession does not violate the Confrontation Clause because the interlocking nature of the testimony marks it with such trustworthiness that there is no material departure from the reason for the Confrontation Clause's general rule.

The Confrontation Clause was not meant to eliminate all hearsay statements against a defendant. Some hearsay statements are sufficiently reliable so that adversarial testing is not required. This Court has consistently recognized that "interlocking confessions" fall into this reliable category of evidence.

The Supreme Court of Washington's holding that the second statement of Sylvia Crawford was properly admitted as an interlocking confession was consistent with the framework established in *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), and this Court's subsequent case law.

In *Roberts*, this Court established that hearsay is admissible in satisfaction of the Confrontation Clause if it bears adequate "indicia of reliability." In *Lee v. Illinois*, 476 U.S. 530 (1986), this Court announced a rule that a co-defendant's confession that is identical to the defendant's own confession in all material respects may be admitted against the defendant and will not violate the defendant's right to confrontation. Thereafter, this Court confirmed the "interlocking confession" rule, *New Mexico v. Earnest*, 477 U.S. 648, 650 (1986), *Cruz v. New York*, 481 U.S. 186 (1987), and modified the rule, *Idaho v. Wright*, 497 U.S. 805 (1990), but never expressly discarded the rule and never overruled *Lee*. Consequently, the Supreme Court of Washington properly relied upon *Lee* in reaching its

decision that the interlocking nature of Sylvia and Michael Crawford's confessions satisfied the Confrontation Clause.

The *Roberts* framework represents a fair balance between a defendant's right to confrontation and valid considerations of public policy and should not be abandoned.

Any procedure short of a literal interpretation of the Confrontation Clause, i.e., exclusion of all hearsay against the defendant, is nothing more than a compromise between a defendant's right to confrontation and various considerations of public policy. The *Roberts* framework has been successfully applied by the lower courts for 23 years, necessitating only occasional fine-tuning by this Court, and is based upon over a century of this Court's evolving Confrontation Clause jurisprudence. This Court should reject the Petitioner's invitation to overrule this jurisprudence, only to substitute a procedure that is simply a compromise that will not resolve any more of the problems surrounding the competing interests of public policy considerations and the right to confrontation than does the *Roberts* framework.

ARGUMENT

I. THE ADMISSION OF A CO-DEFENDANT'S INTERLOCKING CONFESSION DOES NOT VIOLATE THE CONFRONTATION CLAUSE BECAUSE THE INTERLOCKING NATURE OF THE TESTIMONY MARKS IT WITH SUCH TRUSTWORTHINESS THAT THERE IS NO MATERIAL DEPARTURE FROM THE REASON FOR THE CONFRONTATION CLAUSE'S GENERAL RULE.

A. Confrontation Clause General Rule.

The Sixth Amendment's Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The Sixth Amendment is applicable to the States through the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403-405 (1965). The Confrontation Clause does not exist within a vacuum, but against the background of a general rule against hearsay that is riddled with multiple exceptions. *See, e.g.*, Federal Rules of Evidence 803, 804.

Taken literally, the Confrontation Clause would require the exclusion of any statement made by a declarant not present at trial. "But, if thus applied, the Clause would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme." *Ohio v. Roberts*, 448 U.S. 56, 63 (1980). "While a literal interpretation of the Confrontation Clause could bar the use of any out-of-court statements when the declarant is unavailable, this Court has rejected that view as 'unintended and too extreme.'" *Bourjaily v. United States*, 487 U.S. 171, 182 (1987) (citing *Ohio v. Roberts*, 448 U.S. at 63).

B. Competing Public Policy Interests.

"General Rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case." *Mattox v. United States*, 156 U.S. 237, 243 (1895). "Significantly, every jurisdiction has a strong interest in effective law enforcement, and in the development and precise formulation of the rules of evidence applicable in criminal proceedings." *Ohio v. Roberts*, 448 U.S. at 64. Therefore, "the Clause permits, where necessary, the admission of certain hearsay statements against a defendant despite the defendant's inability to confront the declarant at trial." *Idaho v. Wright*, 497 U.S. 805, 814 (1990) (quoting *Maryland v. Craig*, 497 U.S. 836, 847 (1990). This Court has "been careful not to equate the Confrontation Clause's prohibitions with the general rule prohibiting the admission of hearsay statements." *Idaho v. Wright*, 497 U.S. at 814 (citations omitted).

C. The *Ohio v. Roberts* Framework.

In *Ohio v. Roberts*, this Court explained that, as a general rule, "[t]he Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay." 448 U.S. at 65. The first is, in the usual case, the prosecution must demonstrate the unavailability of the declarant. *Id.* The second reflects the Clause's "underlying purpose [which is] to augment accuracy in the fact finding process by ensuring the defendant an effective means to test adverse evidence. . . ." 448 U.S. at 65.

Therefore, when a hearsay declarant is not available for cross-examination at trial, the Confrontation Clause also requires that the statement is admissible only if it

bears adequate "indicia of reliability." 448 U.S. at 66. This "reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. *Id.* "In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Id.*

D. The Interlocking Confession Rule.

The concept of "interlocking confessions" and their inherent reliability was part of federal jurisprudence even before this Court first addressed the issue in *Parker v. Randolph*, 442 U.S. 62 (1979). *See, e.g., U.S. ex rel. Catanzaro v. Manusci*, 404 F.2d 296 (2nd Cir. 1968) (in which the court found the "interlocking confessions" of jointly tried co-defendants were sufficiently reliable to satisfy the Confrontation Clause). In *Parker v. Randolph*, a plurality of this Court determined that the "interlocking confessions" of jointly tried co-defendants were sufficiently reliable to satisfy the Confrontation Clause. *Parker v. Randolph, generally*.[1] This Court next addressed "interlocking confessions" in *Lee v. Illinois*, 476 U.S. 530 (1986), in which this Court recognized that "[o]bviously, when codefendants' confessions are identical in all material respects, the likelihood that they are accurate is significantly increased." *Lee,* 476 U.S. at 545. This Court further explained:

> If those portions of the codefendant's purportedly "interlocking" statement which bear to any significant degree on the defendant's participation

[1] Abrogated by *Cruz v. New York*, 481 U.S. 186 (1987).

> in the crime are not thoroughly substantiated by the defendant's own confession, the admission of the statement poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment. In other words, when the discrepancies between the statements are not insignificant, the codefendant's confession may not be admitted.

Lee, 476 U.S. at 545. The logical inference of this statement is that when the discrepancies between the statements *are* insignificant, then the codefendant's statement *may* be admitted.

Following *Lee v. Illinois*, this Court confirmed, *in dicta*, the continued viability of the interlocking confession rule in *New Mexico v. Earnest*, 477 U.S. 648, 650 (1986) (citing the *Lee* test for the admissibility of interlocking confessions in relation to this Court's holding that the lack of cross-examination is not necessarily fatal to the admissibility of evidence under the Confrontation Clause). The Court next addressed the reliability of interlocking confessions in *Cruz v. New York*, 481 U.S. 186 (1987), in which this Court said, "[q]uite obviously, what the 'interlocking' nature of the codefendant's confession pertains to is not its *harmfulness* but rather its *reliability*: If it confirms essentially the same facts as the defendant's own confession it is more likely to be true." *Cruz*, 481 U.S. at 192 (emphasis in original). And while *Cruz* is not factually similar to this case, Cruz's significance lies in this Court's clear recognition of the reliability of an interlocking confession, i.e., a confession that is virtually identical to the defendant's own confession in all material respects. This Court has not overruled *Lee* or *Cruz*, nor expressly abandoned the concept of the reliability of "interlocking confessions." The Washington Supreme Court specifically relied upon *Lee* in

ruling that Sylvia Crawford's confession to the police was reliable based upon the significant degree in which it interlocked with Petitioner's own confession. J.A. 15.

Petitioner has interpreted this Court's decision in *Idaho v. Wright*, 497 U.S. 805 (1990), as having over-ruled the portion of *Lee* suggesting that a co-defendant's statement may be admitted when the discrepancies between that statement and the defendant's statement are insignificant. The Court in *Wright* merely commented that, in *Lee*, it had considered and rejected the interlocking nature of a co-defendant's and defendant's confessions "in that case." *Wright,* 497 U.S. at 824. A plain reading of *Lee* clearly shows that this Court did not reject the *concept* of interlocking confessions, it simply determined that the confessions in question did not sufficiently interlock. *Lee,* 476 U.S. at 546.

Moreover, *Wright* is factually distinguishable from *Lee*. In *Wright* the State was advocating that a non-testifying victim's statement was reliable because it was corroborated by the *physical evidence* obtained during an examination by a physician. *Wright,* 497 U.S. at 809-811, 819. It was in that context that this Court held, as a general proposition: "hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Wright,* 497 U.S. at 822. Therefore, *Wright* clearly applies only to corroboration by physical evidence. Since this case involves corroboration by the defendant's virtually identical confession, the standard set forth in *Lee* applies.

II. THE ADMISSION OF THE HEARSAY STATEMENTS AT TRIAL DID NOT VIOLATE PETITIONER'S CONFRONTATION CLAUSE RIGHTS BECAUSE THE SECOND STATEMENT WAS AN INTERLOCKING CONFESSION.

A. The admission of Sylvia Crawford's confession at trial.

At trial, Petitioner claimed that he acted in self-defense and he invoked Washington's marital privilege statute to prevent his wife Sylvia from testifying against him. J.A. at 3. The trial court admitted both of Sylvia's statements on the grounds that the statements would not violate the marital privilege and because the court determined that the statements were sufficiently reliable to alleviate Confrontation Clause concerns. *Id.*

B. Application of the interlocking confession rule to Petitioner's case.

The underlying philosophy of the *Roberts* framework is reliability. *See generally*, *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). No hearsay is more reliable than a co-defendant's tape recorded confession that is identical in all material respects to the defendant's own tape recorded confession. The interlocking nature of Sylvia and Michael Crawford's confessions is irrefutable. The Washington Supreme Court found the second statements of Sylvia and Michael Crawford "*are virtually identical*." J.A. 19. The only potential "discrepancy" between the statements of Sylvia and Michael Crawford concerned whether the victim was armed at the time Michael Crawford stabbed him. On this point the statements were identical in that they were both equally ambiguous. Consequently, applying the *Roberts* framework and the *Lee* standard, the second statement of

Sylvia Crawford was clearly marked with such trustworthiness that there is no material departure from the reasons for the Confrontation Clause's general rule.

Common sense demands recognition that a codefendant's tape recorded confession, that is in all material respects virtually identical to the defendant's tape recorded confession, is reliable for purposes of satisfying the Confrontation Clause under the *Roberts* framework. "[T]he veracity of hearsay statements is sufficiently dependable to allow the untested admission of such statements against an accused when ... it contains 'particularized guarantees of trustworthiness' such that adversarial testing would be expected to add little, if anything, to the statements' reliability." *Lilly v. Virginia*, 527 U.S. 116, 124-125 (1999) (quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)). It is difficult to imagine a scenario where adversarial testing would add less to the reliability of a co-defendant's tape recorded statement than when it is virtually identical to the defendant's tape recorded confession. Although Petitioner suggests that confrontation could have helped flesh out Sylvia Crawford's ambiguity about whether the victim was armed when Petitioner stabbed him, this actually could only have harmed the Petitioner in light of his own admissions at trial.[2] Respondent respectfully

[2] Mr. Crawford admitted on cross-examination that he had lied to the police in giving his first statement because he knew he had something to hide. RP 323. He admitted that, even though he was claiming he stabbed Mr. Lee in self-defense, he made no attempt to report the incident to the police. RP 335. Mr. Crawford acknowledged that he had walked four to five blocks while bleeding from a cut to his hand and had passed several telephones and open businesses, yet made no attempt to obtain assistance for his injury or to summons the police, or obtain any type of aid. RP 336-337. Mr. Crawford also admitted that

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requests this Court to hold that the Washington Supreme Court properly relied upon and applied *Lee* in finding that the confession of Sylvia Crawford was sufficiently reliable so as to satisfy the Confrontation Clause.

III. THE *ROBERTS* FRAMEWORK REPRESENTS A FAIR COMPROMISE BETWEEN A DEFENDANT'S RIGHT TO CONFRONTATION AND OTHER IMPORTANT CONSIDERATIONS OF PUBLIC POLICY AND SHOULD NOT BE ABANDONED.

A. Petitioner's suggestion for a new Confrontation Clause framework should be rejected as being unsupported by this Court's prior cases, and as being a wholesale abandonment of the doctrine of *stare decisis*.

This Court has recognized that "general rules" such as the Confrontation Clause, "however beneficent in their

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even when the police approached and became readily available for him to report the stabbing and obtain medical assistance, his response was to turn and walk away from them. RP 338.

Mr. Crawford further admitted that he was the first one to become aggressive during the altercation with Mr. Lee. RP 345. Mr. Crawford admitted that he had told detectives that he had been trying to stab Mr. Lee "straight in" but Mr. Lee was blocking. RP 346. Mr. Crawford admitted that in both of his taped statements following the stabbing, he never claimed to have acted in self-defense. RP 347. Finally, on re-cross examination, Mr. Crawford admitted that when he had first been contacted by the police following the stabbing, he did not say anything about self defense or about being attacked by Mr. Lee, but had instead said "What would you have done if it was your woman? He tried to rape her." RP 361-362.

operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case." *Mattox v. U.S.*, 156 U.S. 237, 243 (1895). It was in consideration of such public policy considerations that this Court developed the *Roberts* framework. *See*, *Roberts*, 448 U.S. at 64 (citing *Mattox* for the above quote). The *Roberts* framework is based upon necessity and reliability and followed almost a century of this Court's jurisprudence and independent legal analysis confirming that the Confrontation Clause was not intended to exclude all hearsay. *Roberts*, 448 U.S. at 62-67.

During the ensuing 23 years since the *Roberts* decision, the trend of this Court has been to adhere to and refine this framework.[3] Petitioner and *Amici*, however,

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[3] *See, e.g.*, *Tennessee v. Street*, 471 U.S. 409 (1985) (No confrontation violation where co-defendant's confession was not admitted as substantive evidence but as rebuttal to defendant's claim of a coerced confession); *United States v. Inadi*, 475 U.S. 387 (1986) (necessity rationale of *Roberts* did not require a showing of unavailability in all cases); *Lee v. Illinois*, 476 U.S. 530 (1986) (reliability can be established by interlocking confessions which are identical in all material respects); *New Mexico v. Earnest*, 477 U.S. 648 (1986) (State is entitled to an opportunity to overcome the weighty presumption of unreliability attaching to codefendant statements by demonstrating that the particular statement at issue bears sufficient "indicia of reliability" to satisfy Confrontation Clause concerns); *Cruz v. New York*, 481 U.S. 186 (1987) (interlocking nature of a codefendant's confession pertains to reliability, not harmfulness); *Bourjaily v. United States*, 483 U.S. 171 (1987) (co-conspirator exception to the hearsay rule is a firmly rooted exception that satisfies the reliability requirement of Roberts); *Idaho v. Wright*, 497 U.S. 805 (1990) (reliability of out of court statement may not be supported by the interlocking nature of physical evidence); *White v. Illinois*, 502 U.S. 346 (1992) (excited utterances and statements made in the course of obtaining medical assistance are sufficiently reliable to satisfy *Roberts* and the Confrontation Clause); and *Lilly v. Virginia*, 527 U.S. 116 (1999) (statements against penal interests are not "firmly

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would have this Court discard both this past 23 years of successful application of the *Roberts* framework and more than a century of this Court's jurisprudence and independent legal analysis confirming that the Confrontation Clause was not intended to exclude all hearsay. In place of the *Roberts* framework, they would put an untested framework that is designed to eliminate otherwise relevant and reliable evidence, with no real reasoning for the replacement other than that *Roberts* is not "traditional" and they do not like the results.

The present case, and its focus on interlocking confessions, is a perfect example of how the proposals of Petitioner and *Amici* would exclude relevant and reliable evidence. The confessions of Sylvia and Michael Crawford were given within minutes of each other and were tape recorded to prevent a later denial of the content of the statement. The statements are virtually identical in all material respects, each co-defendant confirming the actions of the other and themselves. There is no valid or rational reason why this evidence should not be admitted, especially considering that it was the defendant's choice to make Sylvia unavailable for cross-examination (regardless of the fact that there was no wrongdoing). Yet, the proposals of Petitioner and *Amici* would exclude this relevant and reliable evidence.

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rooted" so as to satisfy reliability requirement of *Roberts* and Confrontation Clause).

B. Petitioner's suggested new standard is merely a compromise of the competing values at issue that is more favorable to the defense.

This Court has recognized that the *Roberts* framework balances a defendant's right to confrontation with other important competing considerations of public policy. *Roberts*, 448 U.S. at 64. The Confrontation Clause, literally interpreted, would permit absolutely no hearsay evidence against a defendant, a result that this Court has long rejected as both unintended and extreme. *Idaho v. Wright*, 497 U.S. 805, 814 (1990) (citing *Bourjaily v. U.S.*, 483 U.S. 171 (1987) (quoting *Ohio v. Roberts*, 448 U.S. 56, 63 (1980))). Anything other than a literal interpretation and application of the Confrontation Clause is really nothing more than a compromise between a defendant's right to confrontation and various considerations of public policy.

Both the "traditional approach" proposed by Petitioner and "testimonial approach" proposed by *Amici* are such compromises. Each proposes that this Court interpret the Confrontation Clause to exclude only *testimonial* hearsay.[4] While both Petitioner and *Amici* argue that the Clause is *intended* to exclude only testimonial hearsay, there is nothing in their recitations of the history of the Confrontation Clause that could be so interpreted.

This Court has specifically recognized that "[o]rdinarily, a witness is considered to be a witness 'against' a defendant for purposes of the Confrontation

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[4] There appears, however, to be no real consensus among the briefs of Petitioner and *Amici* on what constitutes this "testimonial hearsay."

Clause . . . if his testimony is part of the body of evidence that the jury may consider in assessing his guilt." *Cruz v. New York*, 481 U.S. 186, 190 (1987) (emphasis in original). Such evidence would necessarily include all hearsay evidence admitted against a defendant. Consequently, the proposals of Petitioner and *Amici* are really designed to eliminate otherwise reliable and probative evidence which is unfavorable to a defendant.

Petitioner and *Amici* argue that their proposals will provide more consistency. Their proposals appear to merely exchange a trial court's determination of reliability with a trial court's determination of reasonableness, i.e., whether a declarant reasonably believed his statement was in furtherance of litigation, rather than *Roberts'* "indicia of reliability."

Finally, it is noteworthy that the Court in *Roberts* was "[c]onvinced that 'no rule will perfectly resolve all possible problems'" and rejected the "invitation to overrule a near-century of jurisprudence" in order to create a new rule. 448 U.S. at 68, n.9, (quoting Natali, *Green, Dutton,* and *Chambers*: Three Cases in Search of a Theory, 7 Rutgers-Camden L.J. 43, 73 (1975)). Petitioner and *Amici* have conceded that their proposals similarly will not perfectly resolve all possible problems. Under these circumstances, the Court should again reject such an invitation.

CONCLUSION

Based upon the above, Respondent respectfully requests that this Court affirm the decision of the Supreme Court of Washington.

Respectfully submitted this 17th day of September, 2003.

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